INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statutes involved	2
Statement	2
Argument	12
Conclusion	21

CITATIONS

Cases:

Angel v. *Bullington*, 330 U. S. 183	15
Chicot County Drainage District v. *Baxter State Bank*, 308 U. S. 371	16
Federal Power Commission v. *Pacific Power & Light Co.*, 307 U. S. 156	16
Federal Water and Gas Corporation, 12 S.E.C. 766 (1943)	10
Federal Water Service Corporation, 8 S.E.C. 893 (1941)	3
Federal Water Service Corporation, 10 S.E.C. 200 (1941)	4
Federal Water Service Corporation, 18 S.E.C. 231, H.C.A. Release No. 5584 (1945)	6
International Union of Mine, Mill & Smelter Workers v. *Eagle-Picher Co.*, 325 U. S. 335	14, 16
Regents of the University System of Georgia v. *Carroll*, 338 U. S. 586	14
Schwabacher v. *United States*, 334 U. S. 182	14
S.E.C. v. *Central-Illinois Securities Corporation*, 333 U. S. 96	15, 16
S.E.C. v. *Chenery Corporation*, 318 U. S. 80	6
S.E.C. v. *Chenery Corporation*, 332 U. S. 194, rehearing denied, 332 U. S. 783	2, 7, 15, 20
Southern Railway Co. v. *Clift*, 260 U. S. 316	17
United States v. *Smith*, 331 U. S. 469	16
United States v. *U. S. Smelting Refining & Mining Co.*, 339 U. S. 186	17

Statute:

Holding Company Act:	
Sec. 11(g)	4
Sec. 24(a)	14

In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 86

CHENERY CORPORATION, ET AL., PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE SECURITIES AND EXCHANGE COMMISSION

OPINIONS BELOW

The case has not been heard by the Court of Appeals. The opinion of the District Court is reported at 87 F. Supp. 289. The opinion and findings of the District Court appear at R. 52-68.[1] The findings and opinion of the Commission (R. 7-31) are reported in Holding Company Act Release No. 8313, and the supplemental findings and

[1] The letter "a" which is included as part of the number of each page of the Joint Appendix in accordance with the rules of the Third Circuit has been omitted herein.

opinion of the Commission (R. 34-38) are reported in Holding Company Act Release No. 8387.

JURISDICTION

The order of the District Court was entered January 11, 1950. Notice of appeal to the Court of Appeals was filed by the petitioners on February 8, 1950 (R. 69). The petition for certiorari was filed on May 22, 1950. Petitioners invoke the jurisdiction of this Court under § 1 of the Act of June 25, 1948, 62 Stat. 928, 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the District Court erred in approving and enforcing pursuant to Section 11(e) of the Holding Company Act a plan for the liquidation of a holding company which, as approved by the Commission in 1948, accorded petitioners the precise amount which the Commission had approved in an earlier plan for the reorganization of predecessor companies in the 1945 order affirmed pursuant to this Court's mandate in *S. E. C.* v. *Chenery Corporation,* 332 U. S. 194 (the second *Chenery* case).

STATUTES INVOLVED

Sections 11(e) and 18(f) of the Public Utility Holding Company Act of 1935, 15 U.S.C. §§ 79k(e) and 79r(f) are printed in the petition at pages 3 and 4.

STATEMENT

Petitioners' statement appears to us to confuse two separate proceedings, first, a reorganization or

merger proceeding—twice before this Court—affecting stockholders of the former Federal Water Service Corporation,[2] and, second, the instant proceeding for court enforcement of a later plan for the liquidation of Federal Water and Gas Corporation, the company which survived the merger.

On March 24, 1941, the Commission issued findings in the merger proceeding indicating approval of Federal's then proposal with respect to the allocation of the new common stock among the public security holders of the old company, but disapproving the plan in its then form insofar as it provided for participation, on a basis of parity with the old company's other preferred stock, of preferred stock purchased individually by the management (Chenery et al.) during the course of the proceeding (R. 93).[3]

Thereupon a new Paragraph Fourth (d) was added to the merger agreement, providing that Chenery et al. were to receive no new stock in respect of their preferred shares purchased after November 8, 1937, but merely cash equal to their cost plus interest at 4% to the effective date of the merger agreement. The merger plan as so amended was approved by the Commission over

---

[2] The prior proceeding involved the merger into Federal Water Service Corporation of its parent company, Utility Operators Company, and a wholly owned subsidiary, Federal Water and Gas Corporation, the creation of a simplified capital structure consisting of debt and common stock only, and the renaming of the surviving corporation as Federal Water and Gas Corporation.

[3] *Federal Water Service Corporation*, 8 S.E.C. 893 (1941).

the objection of Chenery *et al.* on September 24, 1941 (R. 117).[4]

The merger plan did not contemplate court enforcement but was to be consummated under state merger procedure requiring a favorable vote of each class of stockholders affected. Accordingly, Section 11(g) of the Holding Company Act subjected to Commission supervision the company's solicitation of votes for the plan and required distribution in connection therewith of a report by the Commission on the plan. Such a report was distributed along with a letter from C. T. Chenery as President of the Company. Both this letter (R. 121) and the Commission's report (R. 117-118) discussed the Commission's decision, described the new provisions of the merger agreement limiting Chenery et al., in respect of the stock in controversy, to cost and interest, and referred to the possibility of proceedings to review that decision. The letter refers to the plan as one "which required all persons [connected with the management] who, after November 8, 1937, purchased Preferred stock * * * to surrender the stock so purchased to the Corporation" at cost plus 4% per annum (R. 122), but notes:

> If, on appeal by such officers or directors, it should be held that the Securities and Exchange Commission has acted illegally and beyond its authority in this matter, it is be-

[4] *Federal Water Service Corporation*, 10 S.E.C. 200 (1941).

> lieved that such Preferred stock should be permitted to participate in the reorganization on the same basis as other Preferred stock [R. 124].

At the stockholders' meeting of the corporation, Chenery et al. accompanied their votes against the merger with letters which stated, *inter alia:*

> * * * I hereby state with the intention that this statement should be relied upon by the Board of Directors of Federal Water Service Corporation in deciding whether to declare the merger agreement operative that
>
> (1) *if,* in the proceeding taken by the interveners to review the order of the Securities and Exchange Commission, *it is finally determined that said order shall be affirmed, I will surrender my stock* referred to in paragraph FOURTH (d) of the merger agreement to the surviving corporation *for cancellation* for the consideration set forth in paragraph FOURTH (d) of the merger agreement; [R. 126-127. Emphasis supplied.]

A requisite majority of the stockholders voted favorably on the plan, the directors declared it operative, and on October 31, 1941 the merger was fully consummated (R. 125). The old stocks of the merging companies were cancelled, and the new common stock of Federal Water and Gas Corporation was issued. Thus the statement by petitioners (p. 4) that they hold preferred stock in Federal Water Service Corporation is true only

in the sense that they are in physical possession of certain old certificates.

Upon a petition for review filed by Chenery et al., this Court held that the equitable precedents relied upon by the Commission were inapplicable, intimated that the Commission's order might perhaps be sustainable upon grounds not explicated in its opinion, and ordered the case remanded to the Commission for further proceedings not inconsistent with this Court's decision. *S. E. C.* v. *Chenery Corporation,* 318 U. S. 80.

After the remand the surviving company, of which C. T. Chenery was (and still is) the principal executive officer, proposed an amendment to the merger plan based upon the view that the first *Chenery* case required the Commission to accord Chenery et al. equal treatment with public holders of the preferred stock of the old company. In 1945 the Commission entered a new decision (R. 131-173, 63) [5] rejecting that amendment and reapproving the merger plan as of September 24, 1941, in the form which had been approved in the 1941 order set aside in the first Chenery litigation. The Commission stated that the decision was based upon its administrative judgment and experience as applied to the specific facts of the case. Upon review this Court on June 23, 1947, upheld the Commission's action and remanded the case to the Court of Appeals for the District of Columbia for the entry of

[5] *Federal Water Service Corporation,* 18 S.E.C. 231, Holding Company Act Release No. 5584 (1945).

a judgment and decree. *S. E. C.* v. *Chenery Corporation,* 332 U. S. 194.

On July 16, 1947, Chenery et al. (R. 177) and Federal Water and Gas Corporation (R. 174) filed petitions for rehearing in this Court. On October 8, 1947, Federal Water and Gas Corporation filed with this Court a supplement to its petition for rehearing (R. 179). In these petitions substantially the identical arguments were presented that now form the basis for the present petition. Chenery argued then that this Court "has made no holding as to whether or not the provision of the plan whereby the Chenery Corporation and the other interveners are required to surrender their stock at cost plus four per cent interest is 'fair and equitable' " (R. 177). The same *Cities Service* and *American States* decisions, which petitioners here alleged to be inconsistent with the Commission's *Chenery* decision, were cited to this Court, and it was argued:

> In view of these decisions * * * we do not see how this Court can allow its decision in the *Chenery Corporation* case to stand. There has been what may be described as an administrative hoax. * * * These new decisions on the part of the Commission sweep away the entire basis for this Court's decision and raise new questions as to the interpretation of this Court's opinion which, it is respectfully submitted, should be settled by this Court. [R. 180-181].

The petitions for rehearing were denied on October 13, 1947. 332 U. S. 783.

On July 22, 1947, this Court issued its mandate to the United States Court of Appeals for the District of Columbia (R. 178). On or about October 23, 1947, the Clerk of the Court of Appeals submitted to all counsel a draft of a proposed judgment and decree fully affirming the Commission's order (R. 181). Counsel for Chenery et al. and for Federal Water and Gas Corporation opposed the proposed judgment and decree (R. 182-189), and urged that the case be either remanded to the Commission "for further proceedings in conformity with the opinion of the Supreme Court" (R. 182, 189) or that the Commission's order only be affirmed "in so far as it denied the application of Federal Water and Gas Corporation for leave to amend the merger agreement." (R. 183). They stated that if the Court should affirm the Commission's order of February 7, 1945, "it will no doubt be contended by the Securities and Exchange Commission that the judgment of the Supreme Court is res adjudicata as to the fairness and equity of the corporation's depriving the interveners of their stock upon payment of cost plus 4% interest." (R. 186). The Commission filed with the Court of Appeals a memorandum in opposition to these suggested modifications of the proposed judgment and decree (R. 189), urging the issuance of a de-

cree and mandate constituting a full affirmance of the Commission's order. The Commission stated:

> Of course, the Commission would contend that affirmance of its order under review would be a conclusive determination of the fair and equitable issue. * * * The fact that affirmance would under the statutory scheme give finality to the Commission's order is, we submit, an additional reason for entering an order of affirmance unless there appears to be some warrant for setting aside the order, and, as stated above, we believe that the Supreme Court's opinion precludes a reversal in whole or in part. [R. 199.]

On December 12, 1947, the Court of Appeals entered a decree and mandate in substantially the form originally proposed and in accordance with the Commission's recommendation, which set aside and annulled its prior reversal of the Commission's order and provided:

> IT IS FURTHER ORDERED AND DECREED by this Court that the order of the Securities and Exchange Commission issued February 7, 1945, in these cases be, and is hereby, affirmed. [R. 65].

The final step in connection with the merger proceeding was a petition dated January 19, 1948, by Chenery et al. to the Commission for rehearing, reconsideration, and modification of its order of February 7, 1945 (R. 93). This was denied by the

Commission by order dated February 5, 1948 (R. 201). No review of that order was sought.

Meanwhile on December 31, 1942, the new Federal Water and Gas Corporation, created by the 1941 merger, had filed with the Commission a plan pursuant to Section 11(e) of the Act under which it would cease to exist by dissolution or otherwise. The proceeding on said plan was consolidated with proceedings instituted by the Commission with respect to the new corporation pursuant to Section 11(b) of the Act. Parts of said plan were approved by order of the Commission dated February 10, 1943.[6] A number of supplemental plans, applications, and declarations, not now in dispute, were filed in the consolidated proceedings and were acted upon by the Commission from time to time.

On November 7, 1947, Federal Water and Gas Corporation filed with the Commission, pursuant to Section 11(e) of the Act, an Amended and Supplemental Plan providing specific steps to accomplish its dissolution. This dissolution plan of the new corporation, filed subsequent to this Court's decision in the second *Chenery* case, treated as still undecided the amount that Chenery et al. should receive by virtue of their former interest as preferred stockholders in the old company (R. 5-6).

On July 2, 1948, the Commission entered its Findings and Opinion (R. 7-32) in the dissolution

---

[6] *Federal Water and Gas Corporation*, 12 S.E.C. 766.

proceeding, finding that the plan could be approved if amended in certain respects, including a provision for payment to Chenery et al. of the amount determined in the merger proceeding.[7] The Commission stated that "there has been a final determination upheld on judicial review, that the payment of $313,190 in full satisfaction of the claims of Chenery et al. would be fair and equitable" (R. 18), and that "the original security claims of Chenery et al. have been transmuted into and must now be regarded as claims against Federal for an amount of $313,190." (R. 18). The Commission held that even if the principle of *res judicata* were not a bar to reexamination of the question, and even if the matter were one in which, due to changed conditions, the exercise of discretion and reconsideration were permissible, there were no such new considerations or circumstances which would require a different result (R. 19). The dissolution plan as subsequently amended to conform to that opinion was approved by the Commission on July 27, 1948 (R. 34).

On July 28, 1948, the Commission applied to the District Court of the United States for the District of Delaware for enforcement of the plan (R. 3). On August 19, 1948, Judge Leahy of that Court, without opposition, ordered enforcement of the

---

[7] Such payment was to constitute full discharge of all claims of Chenery, et al., unless they should succeed in having the Commission decision overruled by the courts in this proceeding for enforcement of the dissolution plan (R. 23).

plan in all respects except as to Section 3 of the amended plan which provided that the payment by Federal of $313,190 to Chenery et al. would be in full satisfaction of their claims (R. 1). Hearings on that issue were held on October 25, 1948, and September 16, 1949. On December 2, 1949, Judge Leahy entered a memorandum opinion (R. 52), holding himself bound by this Court's decision to find the plan fair and equitable and enforce it, but stating:

> Consequently, if I did not think I were foreclosed by the Supreme Court, as detailed above, I would have no hesitation in holding there is no substantial evidence to support the Commission's finding that Chenery should be penalized and limited to cost plus interest for its preferred stock purchases [R. 57].

On January 11, 1950, the District Court issued an order (R. 58) approving Section 3 of the plan as fair and equitable and appropriate to effectuate the provisions of Section 11 of the Act and ordered the plan enforced. Petitioners appealed from that order to the Court of Appeals for the Third Circuit, and seek review herein before hearing by the Court of Appeals.

ARGUMENT

Petitioners are seeking a reexamination in a collateral proceeding of this Court's decision in the second *Chenery* case, allegedly to "avoid perpetuation of an error once made". (Petition, p. 16). The instant plan for the liquidation of the new Federal

company provides for full payment in cash of petitioners' claim against the new company in the precise amount determined in the old merger proceeding, which terminated their status as preferred stockholders of the old Federal company. We believe the district court was plainly correct in holding that in the second *Chenery* case, "the issue raised here has already been concluded against Chenery by the Supreme Court." (R. 55).

1. It is clear that this Court there upheld the Commission not only in denying Chenery et al.'s participation in the merger on a parity with the public security holders, but in determining that they should be limited to receiving the cash payment prescribed by the Commission. The merger plan as approved in the Commission's 1941 order provided that measure of their participation. (R. 119). The stockholders of the old company who voted on the merger plan were specifically advised of this feature, with the qualification only that Chenery et al. intended to challenge it by review of the order (see pp. 4-5, *supra*).[8]

[8] It is to be noted that the letters above quoted were the result of Chenery's draftmanship. In those letters it was stated that the stock in question "has been required by the plan to be surrendered to the surviving corporation," and that "if * * * it is finally determined that said order shall be affirmed, I will surrender my stock . . . for cancellation." That such statements do not admit of any ambiguity petitioners cannot well deny. Their argument in the court below was to the effect that since the first Chenery case remanded the case to the Commission, petitioners' undertakings are no longer binding on them. We think it clear that such words as "finally determined" did not contemplate any decision short of a complete and final determination.

We believe that they, the Commission, the management, and the reviewing courts all understood that the purpose of the review proceedings was to settle with finality the rights of Chenery et al. to participate in the merger, and not to determine some abstract proposition.[9]

Pursuant to this Court's mandate the Court of Appeals for the District of Columbia affirmed the Commission's order, rejecting petitioners' suggestion that the case be merely remanded for further proceedings before the Commission (R. 65). Section 24(a) of the Act, pursuant to which that review proceeding was brought, confers upon the reviewing Court of Appeals "exclusive jurisdiction to affirm, modify, or set aside * * * in whole or in part" any such order of the Commission, and its judgment in the exercise of such jurisdiction "shall be final, subject to review" by this Court. *International Union of Mine, Mill & Smelter Workers* v. *Eagle-Picher Co.*, 325 U. S. 335, indicates that in such circumstances the Commission itself would

[9] Petitioners rely upon *Regents of the University System of Georgia* v. *Carroll*, 338 U.S. 586, a case involving the impact of a condition to the granting of a broadcasting license upon a third party's contractual rights against the licensee. But in a reorganization proceeding the heart of the federal agency's public responsibility is the conclusive determination of private rights; so much so, that it may not properly defer that issue to determination in a state proceeding. See *Schwabacher* v. *United States*, 334 U.S. 182. The issue actually litigated in the prior *Chenery* cases, and consciously and deliberately framed by cooperation among petitioners, the company, and the Commission, was the nature and extent of their private rights which under the plan should be permitted to survive the merger.

lack power to change its decision after affirmance by a court. In any event, the Commission, on February 5, 1948, after what petitioner alleges to be a change in policy, and on the assumption that it possessed the power to change its ruling, declined to do so (R. 201).

The instant case is a dissolution proceeding involving the successor corporation. Although the two proceedings overlapped in time because of the litigation involving the Chenery stock, the present suit of the Commission to enforce the dissolution plan is entirely separate from the original merger case reviewed by this Court. Petitioners are thus seeking to relitigate in a new suit between the same parties the precise issue finally determined in the prior litigation. Under the circumstances it would be hard to find a clearer case for the application of the rule of *res judicata*.[10] See *Angel* v. *Bulling-*

---

[10] In interpreting the second *Chenery* case as a decision applicable to the facts of the *Chenery* case itself, the district court relied primarily on a restatement of the *Chenery* holding in the *Engineers* case (R. 54-55), *S.E.C.* v. *Central Illinois Securities Corp.*, 338 U.S. 96, 127. We believe it unnecessary to look beyond the second *Chenery* case itself, in which the Court dealt with and rejected the argument that "in the absence of findings of conscious wrongdoing * * * the Commission could not determine by an order in this particular case that it was inconsistent with the statutory standards to permit Federal's management to realize a profit through the reorganization purchases." 332 U.S. 194, 199. See also the dissenting opinion which states that the Commission "did not previously promulgate, and it does not by this order profess to promulgate, any rule or regulation to prohibit such purchases absolutely or under stated conditions." (p. 215)

ton, 330 U. S. 183, 192-193, in which the opinion states:

> The doctrine of res judicata reflects the refusal of law to tolerate needless litigation. Litigation is needless if, by fair process, a controversy has once gone through the courts to conclusion * * * And it has gone through, if issues that were or could have been dealt with in an earlier litigation are raised anew between the same parties.

See also *International Union of Mine, Mill & Smelter Workers* v. *Eagle-Picher Co., supra; Chicot County Drainage District* v. *Baxter State Bank,* 308 U. S. 371; *United States* v. *Smith,* 331 U. S. 469; *Federal Power Commission* v. *Pacific Power & Light Co.,* 307 U. S. 156.[11]

2. Since this is a different litigation, it is controlled by the principle of *res judicata,* and not by

---

[11] Petitioners urge that since the merger Federal has prospered beyond what was then anticipated and in consequence the public preferred stockholders may have been over-generously treated. (Petition, pp. 17-18) Such an argument, if valid, would point to the necessity of reopening the entire plan in view of the very limited participation accorded to Federal's Class A stockholders. Reopening the plan in either respect, however, would give rise to justifiable complaint by those who had meanwhile purchased the common stock of the new Federal in reliance upon the finality of the determination in the merger proceeding. Indeed, if petitioners are entitled to attack collaterally the determination of fairness as to them, it is hard to see how any determinations of fairness could settle anything in the Commission's step-by-step simplification of holding company systems. *Cf. S.E.C.* v. *Central-Illinois Securities Corporation,* 338 U.S. 96, 140-142.

the doctrine of the law of the case. *Southern Railway Co.* v. *Clift,* 260 U. S. 316. But even if the contrary be assumed, this Court's decision in the second *Chenery* case was clearly binding on the district court under the latter doctrine. Even though this would not make the decision controlling here, we believe the petition fails to show such exceptional considerations as would warrant departure from the "rule of practice, based upon sound policy that when an issue is once litigated and decided, that should be the end of the matter." See *United States* v. *U. S. Smelting Refining & Mining Co.,* 339 U. S. 186, 198, cited by petitioners, p. 21. In any event, the basis now urged for reexamination of the second *Chenery* case is substantially identical with that previously presented to this Court in connection with petitioners' timely petition for rehearing which this Court denied on October 13, 1947. (See *supra,* pp. 7-8).

3. Even if the Commission had rendered subsequent inconsistent opinions in other cases dealing with other parties, the doctrines of *res judicata* and law of the case would still be controlling in this case. However, we do not believe that the later decisions are inconsistent with the *Chenery* case. The district court's opinion assumes these later cases to be indistinguishable from the decision in the *Chenery* case merely because in each instance proof was lacking that those who traded in the course of the

proceeding permitted their personal interest in trading activities to warp their judgment as fiduciaries (R. 56-57). This analysis seems to us to oversimplify the problem, as well as to ignore the basis for distinction expressed in the Commission's opinions in question, namely, the degree of conflict of interest resulting from the purchases involved in the several cases. The Commission has not abandoned the view that actual wrongdoing need not be proved; it has merely held that absent actual wrongdoing, the degree of conflict of interest and the likelihood of harm to public investors may be examined in the individual case, and that when the conflict is less acute than in the *Chenery* situation, a different result may be justified. Thus the *Cities Service* opinion, after carefully examining the facts, refers to "the conclusion we have reached that the trading here involved did not create a conflict as acute or carry as great a degree of potential danger in [*sic*] the interests of other investors and to the integrity of the reorganization process as that created by the concerted purchase program involved in the *Federal Water Service* case." (R. 222-223) The Court is respectfully referred to the opinions of the Commission in the later cases involving management purchases, where the grounds of distinction are spelled out at length (R. 218-223, 237-246, 290-294, 18-22).[12]

[12] We might point out again that these same charges of inconsistency have previously been urged upon this Court in the petition for rehearing (R. 179-181) which this Court denied in 1947.

The district judge's observation that if he were free to do so he would find no substantial evidence to support the fairness of the treatment of Chenery et al. appears to us merely an expression of personal disagreement with what this Court held to be the allowable judgment of the Commission within an area confided to it by the Congress. See 332 U. S. 194, 209. The fact that there is room for strong differences of opinion in reconciling the conflicting aims of protecting the integrity and flexibility of the reorganization process and of avoiding harsh impact on individuals is, as the second *Chenery* case recognizes, no reason for denying effectiveness to a rational, if disputable, administrative judgment in this area.

The Commission still believes, as it argued in the *Chenery* case, that it is not feasible to anticipate and cover by an all-inclusive rule the varying situations in which the proper discharge of a fiduciary obligation precludes the fiduciary from engaging in conduct for personal profit because of the conflicting interest created by such collateral activity. At the same time the Commission is, and has been, conscious of the element of retroactivity in applying an ethical judgment after the event. A choice between these two conflicting considerations necessarily presents a problem of degree, as did the *Chenery* case itself; in that case the Commission permitted participation by the management on a

parity with public security holders with respect to purchases of preferred stock made during the period prior to the registration of Federal, when there were discussions with the Commission's staff with respect to the anticipated registration of Federal and the subsequent effectuation of a plan under the Act. We believe that there is at least as valid a distinction of degree between the Commission's holding in the *Chenery* case and its holding in the three later cases relied upon by petitioner.

This Court's opinion in the second *Chenery* case holds that "the choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency." (332 U.S. at 203) At the same time the opinion admonishes that "The function of filling in the interstices of the Act should be performed, as much as possible, through this quasi-legislative promulgation of rules to be applied in the future." (*ibid.*, p. 202) If petitioners and the district court are right in their view that the three administrative decisions since the *Chenery* case were more lenient than its decision as to Chenery in applying the Commission's policy of discouraging trading by fiduciaries, it would amount at most to showing that the Commission in those cases heeded the admonition of this Court to proceed with caution in exercising a choice of

method held to lie within its statutory power. The Commission specifically adverted to this admonition in both the *Cities Service* case (R. 223) and the *American States* case (R. 240).[13]

CONCLUSION

This case does not in our view raise any question calling for further review by this Court, and if it came from a court of appeals we would unqualifiedly oppose the granting of a petition for certiorari. Since the case turns upon the effect of this Court's prior decision, we do not base our opposition on the ground that the case should first be heard by the court of appeals. Indeed, the Court may regard this as an appropriate time to end an already protracted litigation by granting the writ

---

[13] Petitioners argue (p. 15) that the *Cities Service* case was a stronger case for limitation to cost than the Commission's decision as to them because the Cities Service management had made purchases after the Commission in its 1941 decision as to Chenery et al. had given notice to the industry of its objection to management purchases in the course of a reorganization. The Commission expressly dealt with that consideration in its opinion in the *Cities Service* case, concluding:

> Most of the trading involved in the instant case occurred between the dates of our first and second *Federal* decisions. In view, however, of our express disclaimer of the announcement of a general rule, the reversal of our earlier decision, and the litigation concerning the decision on remand, it has seemed fairer not to treat either decision as an announcement of a prospective principle to be applied in situations where the conflict of interest was not as clear as in the *Federal* case itself [R. 224-225, fn. 23].

and summarily affirming the judgment of the district court.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

ROBERT L. STERN,
Special Assistant to the Attorney General.

ROGER S. FOSTER,
General Counsel,
MYRON S. ISAACS,
Special Counsel,
RICHARD S. RIES,
ELLWOOD L. ENGLANDER,
Attorneys,
Securities and Exchange Commission.

JUNE, 1950.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1950 890981 754

INDEX

	PAGE
Preliminary Statement	1
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statute Involved	2
Statement	2
Argument	4
Conclusion	12

CITATIONS

American Surety Company v. Baldwin, 287 U. S. 156	8
Baltimore S.S. Co. v. Phillips, 274 U. S. 316	8
Darr v. Burford, decided U. S. Supreme Court, April 3, 1950	5
Deposit Bank v. Frankfort, 191 U. S. 499	6
Federal Water Service Corporation, Holding Company Act Release No. 5584	3
Forsyth v. Hammond, 166 U. S. 506	8
Grubb v. Public Utilities Commission, 281 U. S. 470	8
Regents of the University System of Georgia v. Carroll, decided U. S. Supreme Court, February 6, 1950	10
Root v. Woolworth, 150 U. S. 401	7
Securities and Exchange Commission v. Central-Illinois Sec. Corp., 338 U. S. 96	9, 10
Securities and Exchange Commission v. Chenery Corporation et al., 318 U. S. 80	3, 11
Securities and Exchange Commission v. Chenery Corporation et al., 332 U. S. 194, rehearing denied, 332 U. S. 783	2, 3, 5, 7, 8, 11
United States v. United States Smelting, Refining and Mining Co., decided U. S. Supreme Court, March 27, 1950	11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 837

IN THE MATTER

OF

FEDERAL WATER AND GAS CORPORATION, et al.

CHENERY CORPORATION, et al.,

Petitioners.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM ON BEHALF OF FEDERAL WATER AND GAS CORPORATION COMMON STOCKHOLDERS' COMMITTEE, RESPONDENT

Preliminary Statement

This brief is submitted by respondent, Federal Water and Gas Corporation Common Stockholders' Committee. Its purpose is to demonstrate that the judgment below is correct and should be summarily affirmed.

Opinions Below

The Court of Appeals has not rendered an opinion. The opinion of the District Court (R. 52a) is reported at 87 F. Supp. 289. The opinions and orders of the Securities and Exchange Commission (R. 7a, 34a) dated July 2, 1948, and July 27, 1948, not yet officially reported, are contained in Holding Company Act Releases Nos. 8313 and 8387.

Jurisdiction

The jurisdiction of this Court is invoked under subdivision (1) of the Act of June 25, 1948 (28 U. S. C. 1254(1)).

Questions Presented

(1) Whether petitioners may collaterally attack the final judgment in *Securities and Exchange Commission* v. *Chenery Corporation*, 332 U. S. 194, adjudicating them creditors of Federal Water and Gas Corporation in the sum of $313,190.

(2) Is a plan under Section 11(e) of the Public Utility Holding Company Act of 1935 that provides for payment in full of creditors' claims, fair and equitable as to them?

Statute Involved

The statute involved is the Public Utility Holding Company Act of 1935 (15 U. S. C. A. 79). The pertinent provisions are set forth herein where appropriate.

Statement

This respondent appears on behalf of the public holders of the outstanding 976,303 shares of common, the only class of stock of Federal Water and Gas Corporation outstanding. This is the stock that was issued to those, other than petitioners, Chenery Corporation and others (Chenery et al.), who formerly held the preferred stock of Federal Water Service Corporation, pursuant to a plan filed by the

latter corporation under Section 7 of the Public Utility Holding Company Act (Act) for its reorganization by merger with Federal Water and Gas Corporation and Utility Operators Company. Such plan (amended to provide that in lieu of receiving new stock of the corporation resulting from the merger (new Federal Water and Gas Corporation), Chenery et al. should have only a claim against that corporation for the cost of their Federal Water Service Corporation preferred stock, with interest to October 31, 1941 (the effective date of the merger plan), a total of $313,190) was approved by the Securities and Exchange Commission (Commission) on September 24, 1941. That order having been set aside by this Court and the case remanded to the Commission for further proceedings,[1] the Commission entered an order on February 7, 1945, reapproving, as of September 24, 1941, the amended reorganization plan.[2] Finally, pursuant to a mandate of this Court upon a second appeal by Chenery et al.,[3] the Court of Appeals for the District of Columbia on December 12, 1947, entered an order affirming the Commission's order of February 7, 1945 (R. 65a).

In November, 1947, Federal Water and Gas Corporation filed an amended plan under Section 11(e) of the Act providing for its liquidation and dissolution and the distribution of its assets to the holders of its 976,303 shares of common stock, after payment to Chenery et al. of the $313,190, if the Commission decreed that the claims of Chenery et al. should be so limited (R. 6a). The Commission, by opinion and order dated July 2, 1948, held that the claims of Chenery et al. had previously been so limited by it, that such determination had been reviewed

[1] *Securities and Exchange Commission* v. *Chenery Corporation et al.*, 318 U. S. 80 (1943).

[2] *Federal Water Service Corporation*, Holding Company Act Release No. 5584.

[3] *Securities and Exchange Commission* v. *Chenery Corporation et al.*, 332 U. S. 194 (1947), rehearing denied, 332 U. S. 783 (1947).

and affirmed by this Court and that there were no grounds for reviewing or in any wise altering or modifying its previous determination (R. 7a). Thereafter the plan having been amended to conform to its opinion, on July 28, 1948, the Commission applied to the United States District Court for the District of Delaware for an order enforcing the plan of dissolution (R. 3a). Chenery et al. opposed the issuance of such order upon the ground that there was no substantial evidence to support the Commission's findings that the plan was fair and equitable to Chenery et al. The District Court found that this Court had finally affirmed the Commission's order that Chenery et al., in lieu of receiving common stock of Federal Water and Gas Corporation for their preferred stock of Federal Water Service Corporation, should receive and be limited to its cost and interest ($313,190) and accordingly granted the order of enforcement (R. 52a).

From such order Chenery et al. appealed to the Court of Appeals for the Third Circuit (R. 69a), and now seek certiorari and remand to the Commission at the hands of this Court without further hearing upon the ground that "the second Chenery decision does not determine the disposition of petitioners' claims against Federal" (Pet., p. 23).

Argument

To the extent that petitioners seek certiorari and consequent prompt consideration and final determination of this attempt to resurrect a defunct issue, this respondent fervently joins in such plea to the end that there may be an end to this litigation pending since 1940.[4]

[4] We join in the petitioners' prayer that this Court grant certiorari since a denial of this petition, without explanation, would unnecessarily protract this litigation and it would be paradoxical to ask the Court to deny the writ because it had examined the merits and found them wanting. ("To attach significance to a denial of a certiorari petition regarding the merits of the issues raised by the petition

To the extent that petitioners seek remand to the Commission, this respondent submits that the determination of the District Court should be summarily affirmed for the single, sole and sufficient reason that the issue here sought to be revived was heretofore laid at final rest by this Court;[5] that in consequence of this Court's affirmance of the order of the Commission approving the merger plan of the old Federal Water Service Corporation and the consummation of such plan, Federal Water Service Corporation went out of existence, its preferred shareholders became common shareholders of the present Federal Water and Gas Corporation, now in dissolution, with the exception of Chenery et al., whose preferred Federal Water Service stock was converted into a creditor claim against the assets of the present Federal Water and Gas Corporation, in the sum of $313,190.

In a word, in consequence of litigation between these very parties, finally concluded, the present common shareholders of Federal Water and Gas Corporation, who are here represented by this respondent, became and are the beneficial owners of the Federal Water and Gas assets subject only to a liability to Chenery et al., creditors of Federal Water and Gas, in the sum of $313,190.

Nevertheless, Chenery et al., who are not and never have been shareholders of Federal Water and Gas Corporation; who are, by virtue of a final and binding adjudication, merely creditors of that corporation, seek, in these subsequent and independent dissolution proceedings of Federal Water and Gas Corporation, to revive the previously adjudicated issue of their status under the guise of a claim that the dissolution plan is not fair and equitable to them

---

* * * would contradict all that led to the adoption of certiorari jurisdiction and would reject the whole course of the Court's treatment of such petitions, both in practice and profession. For if denial does import an expression of opinion upon the merits of the case, then we must deal with the merits of the case." Frankfurter, J., dissenting op. *Darr* v. *Burford*, decided this term, April 3, 1950.)

[5] *Securities and Exchange Commission* v. *Chenery Corporation et al.*, 332 U. S. 194 (1947), rehearing denied 332 U. S. 783 (1947).

because it provides for payment of their adjudicated creditor claim in full and does not accord them the residual rights of stockholders.

But Chenery et al. are creditors and not stockholders and under the present plan their creditor claim is to be paid in full. Manifestly when a plan provides that a creditor is to be paid in priority in full and in cash, the plan is fair and equitable to such creditor.

The issue is that simple. There can be no challenge of the statement that on March 24, 1941, the Commission expressly disapproved the merger plan because it attempted to permit Chenery et al. to convert their preferred stock, on a parity with other preferred stockholders of Federal Water Service Coporation, into the new common stock of the emerged corporation, Federal Water and Gas Corporation. Nor can there be any doubt that the Commission's order approving the amended plan which limited the claims of Chenery et al. against the assets of the emerged corporation, Federal Water and Gas, to cost plus interest, was reapproved on February 7, 1945, by the Commission and that it was this order that was affirmed pursuant to the mandate of this Court (R. 14a, 15a, 16a-18a).

That the Commission's determination was predicated upon the enforcement of a rule or policy—or that such rule or policy was fair or unfair, equitable or inequitable, legal or illegal—all this is presently immaterial. By a final and binding order of the Commission, affirmed by this Court, the choate and inchoate rights of Chenery et al. were transmuted into a final and binding judgment under which specific property rights vested in the old Federal Water Service public preferred shareholders vis-a-vis their officers (Chenery et al.) and specific property rights vested in Chenery et al. vis-a-vis the present common shareholders of Federal Water and Gas Corporation. Whatever may have been the abstractions or the equities of the claims in controversy between the original parties prior to 1947, they were converted into concrete adjudicated property relationships (*Deposit Bank* v. *Frankfort*, 191 U. S. 499,

510, 511). Chenery et al. became creditors entitled to priority; the former Federal Water Service preferred stockholders became subordinate Federal Water and Gas common shareholders entitled to share the assets of the corporation after the creditor claim of Chenery et al. had been first satisfied therefrom. Here comes into operation one of the primary functions of the rule of *res judicata,* the prevention of subsequent disturbance of property relationships and derivative property rights, resulting from litigation finally and bindingly adjudicated (See *Root* v. *Woolworth,* 150 U. S. 401).

Now we find Chenery et al. urging that the prior determination of the Commission that Chenery et al. should be restricted to a limited dollar claim against the assets of the new corporation was not fair and equitable. That contention, however, was finally disposed of by this Court in its second *Chenery* opinion.

As a corollary we find Chenery et al., also urging that later decisions of the Commission dealing with management purchases cannot be reconciled with the final judgment, and the rationale thereof, in the second *Chenery* case. Although the Commission noted factual distinctions in those other cases that, in its opinion, warranted a different result, in any event, no such justification is required in the present proceeding. Even though the factual bases in the *Chenery* case and in the later decisions of the Commission were on all fours, or even if the circumstances in the later cases were more compelling for limitation to cost, neither of the two possible conclusions to be drawn therefrom would avail petitioners. Assuming that the second *Chenery* case was correctly decided, then the public securityholders in those later cases who did not benefit as they would have, had the officers of those corporations been limited to cost, could have successfully prosecuted appeals and obtained reversals. That, manifestly, would not affect the result here. On the other hand, if the second *Chenery* case was incorrectly decided, then this Court would have refused to be bound by the principle of *stare decisis* and

in those cases, would have rejected the contention of public securityholders that the officers should be limited to cost.

But such result would not have entitled Chenery et al. to review the result of their decided litigation or to challenge the principle of *res judicata* that bound them and the other parties to the relationships resulting from their litigation (*Baltimore S.S. Co.* v. *Phillips,* 274 U. S. 316, 325).

Obviously, a discussion of the propriety of these subsequent decisions has only academic interest. The fact that is all compelling here is that whether rightly or wrongly decided, the second *Chenery* case *was decided* and resulted in a final judgment that conclusively adjudicated the mutual and conflicting rights of Chenery et al. and the stockholders represented by this respondent in Federal Water and Gas Corporation and conclusively binds Chenery et al. to the result.

Such discussion merely points the difference between the doctrine of *stare decisis,* which a Court may refuse to follow, which it may expressly reject in a given case, and the principle of *res judicata* under which litigants have vested rights. No one can credibly contend, as petitioners here attempt, that a final judgment conclusive as to a litigant should be reopened or disregarded because a judicial tribunal in a subsequent litigation between different parties has refused to follow the precedent of the prior judgment or even confesses that its present opinion is that the conclusion therein was erroneous. (See *Forsyth* v. *Hammond,* 166 U. S. 506, 517-8.)

No judgment would have any finality, development of the law would be impossible and no Court could reconsider an issue in a subsequent suit if the result thereof might enable parties to the prior litigation to reopen proceedings and to reassert claims that had previously been disposed of.

The application here of the principles of *res judicata* (*American Surety Company* v. *Baldwin,* 287 U. S. 156, 164, 165; *Grubb* v. *Public Utilities Commission,* 281 U. S. 470) is exigent to do equity to the Federal Water and Gas share-

holders this respondent is here representing. These are the shareholders who approved the 1941 merger plan, conditioned upon its express provision that the claims of Chenery et al. against the assets of the merged corporation should and would be creditor claims limited to cost and interest, and that Chenery would so acknowledge if, as ultimately proved the case, the Commission's order was finally affirmed (R. 126a-127a). Likewise, since the final 1947 adjudication of the issue of fairness involved in that award to Chenery et al., the common stock of Federal has been bought and sold in the public markets and much of that stock here represented was purchased in reliance upon the finality of that determination. It would be tergiversation, in the extreme, here and now to sanction a review of that determination.

Petitioners here attempt to avoid the binding force of *res judicata* upon an amorphous theory, obscurely articulated, which becomes a conclusion, lacking syllogism, that all proceedings under the Act affecting a holding company are as one; that successive steps by which ultimate reorganization under the Act is accomplished [6] lack separate

---

[6] The holding of this Court in the *Central-Illinois* case, quoted in the succeeding footnote, is of special significance in the light of the argument in the Commission's brief therein to this Court (pp. 57-9), which led to that holding:

> "Confronted with the task of bringing about a sweeping reorganization of the more than 15 billion dollar industry subject to the Act, the Commission has necessarily adopted a step by step approach. * * * But use of the step by step approach would be without substantial value unless each step could be treated as a unit, to be appraised with finality in its impact upon investors and consumers, and subjected to judicial review only within the time limits prescribed by the statute as applicable to individual Commission orders. * * *
>
> "We believe that only chaos can result from opening up consummated plans and transactions to reevaluation in the light of hindsight, particularly where, as in this instance, the reexamination is not to readjust equities between parties to the transaction but to shift the burden of the impact of the consummated transaction in the relationship *inter sese* of security holders of one of the parties thereto."

identities, that their consanguinity is such that at each successive stage of reorganization, the Court must determine that a particular plan designed to solve the problem then existing is fair and equitable, not only in the light of what is then proposed but by a re-examination and reappraisal of the issues involved and resolved in all prior plans and proceedings. That, of course, is not and could not be the law; else all finally consummated plans prior to an ultimate dissolution would be futile and without binding force. The fact is and must be that each plan is a separate one and its approval involves an adjudication that determines finally the issues raised and decided. This is necessarily so when reorganization is finally effected through a series of 11(e) plans.[7]

And the conclusion is compelled even more strongly when, as here, the initial plan involves a merger proceeding under Sec. 7, and a subsequent plan involves a plan of dissolution under Sec. 11(e).

Here the merger was proposed, approved and consummated in 1947. Subsequently the corporation resulting from the merger undertook to dissolve. Manifestly these plans and proceedings were wholly independent, had separate and individual identities and no possible ground can exist to justify review in the subsequent proceeding of the issues settled by the adjudication of the prior one.

Petitioners' citation of the recent decisions of this Court in *Regents of the University System of Georgia* v. *Carroll*,

[7] *Securities and Exchange Commission* v. *Central-Illinois Sec. Corp.*, 338 U. S. 96, where there had been a succession of Section 11(e) dissolution plans of Engineers Public Service Company. There the argument was made that in the consideration of each successive plan, fairness and equity should be determined on the basis of a reconsideration of all that had previously occurred—the balance sheet was to be reconstituted as if the divestitures had not taken place. This Court rejected that claim and held that the fairness and equity of each particular plan must be determined on the assumption that what had previously been done was fair and equitable, for "the Commission's determinaation upon which the various divestiture orders were based may not be collaterally attacked" (p. 142).

decided this term, February 6, 1950, and *United States* v. *United States Smelting, Refining and Mining Co.*, March 27, 1950, is meaningless. The former decision is so obviously irrelevant in the present situation that discussion is unwarranted. The latter, so far as it is in point, supports the position of respondents rather than that of petitioners, and therefore justifies a word of comment.

There, as the opinion itself pointed out, neither "the rule of the law of the case" ("a discretionary rule of practice"), nor "the kindred rule of *res judicata*" ("a uniform rule"), was "applicable because when the case was first remanded, nothing was finally decided. The whole proceeding thereafter was *in fieri*. The Commission had a right on reconsideration to make a new record". That was exactly the situation here after this Court had rendered its first *Chenery* decision (318 U. S. 80), remanding the case to the Commission. It was no longer the situation after the Commission had reinstated its order and this Court had affirmed it by the second *Chenery* decision (332 U. S. 194). Then the situation here became what it now is in the *U. S. Smelting* case—a reaffirmance by the Commission of its prior order after remand on the first appeal and an affirmance of such order, a final adjudication by this Court, by reason of which the suitors might thereafter invoke the "uniform rule" of *res judicata* to bar subsequent challenge of the Commission's order.

CONCLUSION

The shareholders represented by this respondent are the beneficial owners and upon dissolution are entitled to receive the assets of Federal Water and Gas Corporation, subject only to payment to the petitioners of the sum of $313,180;

The plan provides for payment to the petitioners of that sum in cash and distribution to these respondents of the remaining assets;

Such distribution has been and is being withheld from these shareholders by the petitioners' unjustified refusal to accept payment in full and in cash of their adjudicated claim and by petitioners' unjustified effort to review their status, already finally adjudged;

Unless this Court takes jurisdiction and affirms the order of the District Court below, distribution to these shareholders will continue to be delayed;

WHEREFORE, this respondent prays this Court to grant certiorari and to summarily affirm the judgment below.

Respectfully submitted,

PERCIVAL E. JACKSON,
Counsel for Respondent Federal Water and Gas Corporation Common Stockholders' Committee.

Office - Supreme Court, U. S.
FILED
JUN 22 1950
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 86

In the Matter of

FEDERAL WATER AND GAS CORPORATION, et al.,

CHENERY CORPORATION, et al.,

Petitioners.

BRIEF ON BEHALF OF FEDERAL WATER AND GAS CORPORATION, RESPONDENT

ALLEN S. HUBBARD
Counsel for Respondent Federal Water and Gas Corporation

HUGHES, HUBBARD & EWING
One Wall Street
New York, N. Y.,
Of Counsel.

INDEX

PAGE

Preliminary Statement 1

Statement and Reasons for Granting the Writ 2

CITATIONS

CASES:

Securities and Exchange Commission v. *Chenery Corporation, et al.*, 318 U. S. 80 ..... 5, 8

Securities and Exchange Commission v. *Chenery Corporation, et al.*, 332 U. S. 194 ..... 10, 11

STATUTES:

Public Utility Holding Company Act of 1935:

Section 7 ..... 6, 7

Section 11(e) 11

Section 24 6

Delaware Corporation Law, § 61 ..... 4, 5

OTHER CITATIONS:

WOLF, *Logic* in 14 ENCYC. BRIT. 307, 310 (1947).. 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

In the Matter of FEDERAL WATER AND GAS CORPORATION, et al., CHENERY CORPORATION, et al., *Petitioners.*	No. 86

BRIEF ON BEHALF OF FEDERAL WATER AND GAS CORPORATION, RESPONDENT

Preliminary Statement

This brief is submitted in support of the petition of Chenery Corporation, et al., for a writ of certiorari to the United States Court of Appeals for the Third Circuit. If this Court can decide the question presented by the petition summarily, Federal urges that it do so, to the end that there may be a final determination of the relative rights of Federal and Chenery, et al., as soon as possible, thereby expediting the liquidation of Federal and the distribution of its assets to its stockholders.

Federal adopts the statements made in the petition on behalf of Chenery, et al., under the captions "Opinions Below", "Jurisdiction", "Question Presented" and "Statutes Involved", but desires to supplement the "Statement" and the "Reasons for Granting the Writ" contained in that petition, as follows.

Statement and Reasons for Granting the Writ

On October 31, 1941, there was filed in the office of the Secretary of State of Delaware and in the Recorder's Office of Kent County, a merger agreement between Federal Water Service Corporation, Utility Operators Company and Federal Water and Gas Corporation. All were Delaware corporations. Utility Operators Company owned all of the Class B or controlling stock of Federal Water Service Corporation. Federal Water and Gas Corporation was an insignificant subsidiary of Federal Water Service Corporation, which had been organized to hold the name "Federal Water and Gas Corporation". By the merger agreement, Federal Water Service Corporation became the surviving corporation which assumed the name of Federal Water and Gas Corporation. The merger agreement contained the following provision (111a):

> "FOURTH: The manner of converting the shares of capital stock of each of the constituent corporations into shares of stock of the surviving corporation shall be as follows:
>
> * * *
>
> "(d) No shares of common stock of the surviving corporation shall be issued in lieu of the shares of preferred stock of Federal Water Service Corporation purchased since November 8, 1937 by Chenery Corporation, or since November 8, 1937 by the following persons when they were officers or directors of Federal Water Service Corporation or Utility Operators Company and which are owned by them on the effective date of the merger agreement: J. N. Greene, W. R. Edwards, C. M. Chenery, H. G. Calder, C. P. Rather, R. H. Neilson, Wm. E. Matthews, III, Watson Dark, E. C. Deal, H. M. Erskine,

F. T. Tansill, F. R. Harris, W. A. Culin, H. D. McHenry, T. H. Wiggin, E. C. Elliott and C. van den Berg, Jr. Each such holder shall be entitled to receive and the surviving corporation shall be obligated to pay, upon the surrender of the certificates of such stock to the surviving corporation, the actual cost of such stock to such holder, together with interest thereon at four per cent per annum from the dates of its or his purchase of such stock to the effective date of the merger agreement. In ascertaining cost of preferred stock acquired by exchange of other securities for purposes of this provision, the fair market value at the date of exchange of the securities given in exchange shall be deemed to be the cost of such preferred stock. In the event any shares of preferred stock of Federal Water Service Corporation purchased by Chenery Corporation or by the said officers or directors of Federal Water Service Corporation or Utility Operators Company since November 8, 1937, shall have been sold by such corporation or individual prior to the effective date of the merger agreement, the surviving corporation shall, upon the surrender of the remaining such shares owned by such corporation or individual, be obligated to pay to such corporation or individual a sum equal to the actual cost of all preferred stock of Federal Water Service Corporation purchased by it or him since November 8, 1937, together with interest thereon at four per cent per annum from the dates of its or his purchase of such stock to the effective date of the merger agreement minus the proceeds of the sale by it or him of any such shares together with interest thereon at four per cent per annum from the dates of its or his sale of such stock to the effective date of the merger agreement. The shares of preferred stock to be acquired by the surviving corporation pursuant to this subdivision (d) of the merger agreement con-

sist of 4,522 shares of preferred stock of Federal Water Service Corporation of the $6 series, 5,610 shares of the $6.50 series and 1,466 shares of the $7 series."

Under this provision of the merger agreement, Chenery, et al., were not entitled to exchange their preferred stock of Federal Water Service Corporation for common stock of the surviving company, but were entitled to receive upon the surrender of their certificates the actual cost of the stock (reduced by profits on prior sales) with interest at 4% to October 31, 1941. The aggregate amount to which Chenery, et al., were entitled in accordance with this provision of the merger agreement was $313,190.22. At the time this provision was inserted in the merger agreement, it was assumed that Chenery, et al., could review the order of the Commission approving this provision and upon review, it would be determined by the Court whether or not this provision was in accordance with the legal rights of Chenery, et al.

In order to protect their rights as they might eventually be determined to be, each of the persons whose stock was discriminated against voted such stock against the merger agreement (126a, 127a, 130a and 131a) and, within the time allowed by Section 61 of the Delaware Corporation Law, notified Federal of his contention that paragraph Fourth(d) of the agreement was illegal and demanded that Federal issue shares of its common stock of the par value of $5 each in exchange for the shares of preferred stock upon the same terms and conditions as the common stock was offered to other holders of the same class or, in the alternative, demanded damages for the unlawful conversion of the stock by paragraph Fourth(d) of the

agreement of merger or, in the alternative, demanded payment for the stock pursuant to Section 61 of the General Corporation Law of the State of Delaware "all to the end that in the event the order of the Securities and Exchange Commission in so far as it approved said paragraph Fourth(d) of the said agreement of merger shall be modified or set aside, I shall have all the rights in the premises to which I am legally entitled."

The order of the Commission of September 24, 1941 approving paragraph Fourth(d) of the merger agreement was set aside pursuant to the decision of this Court in *Securities and Exchange Commission* v. *Chenery Corporation, et al.,* 318 U. S. 80 (1943). Thereafter Federal made an application to the Commission for leave to amend the merger agreement to provide for the issuance of its stock to Chenery, et al., upon the same terms as such stock had been offered to others by the merger agreement. This application was denied by order of the Commission of February 7, 1945 (62a, 63a) and Federal was thereby prevented from issuing its common stock to Chenery, et al., in exchange for their outstanding preferred stock.

The grounds upon which the Commission's order of February 7, 1945 was based did not involve any determination of the legal rights of Chenery, et al. If, for instance, the Commission had held that Chenery, et al., were only legally entitled to $313,190.22 upon surrender of their stock, and that for this reason it would be detrimental to the public interest or the interest of investors, and would not be fair and equitable, to allow Federal to issue to Chenery, et al., its stock, having a greater value in the market than $313,190.22, it could reasonably be said that the Commission had attempted to make an adjudication as to the claims of Chenery, et al., against Federal as a basis for an order

preventing Federal from amending the merger agreement. No such determination was assayed by the Commission.

The effect of a mere negative order of the type presented by the Commission to this Court for review can perhaps be illustrated by the following hypothetical case: A public utility holding company files a declaration under Section 7 of the Act, proposing an issuance of bonds in the amount of $1,000,000 to pay off a maturing issue of like principal amount. The Commission, upon inquiry, finds that the holder of the maturing issue has purchased the bonds for less than par. The Commission can under these facts look upon the proposal as one in which it is asked to approve the issuance of new bonds as the means whereby the holder of the retiring issue will obtain a profit. It determines that such profit ought to be prohibited and enters a finding that the proposed issuance of bonds is on terms that are detrimental to the public interest or the interest of investors and consumers. It thereby prevents the company from meeting its obligations to its creditor in the manner proposed. It is plain that there has been no adjudication by the Commission as to the rights of the creditor. It certainly could not be contended that by reason of being defeated in its proposal to issue the new bonds the company had obtained a judgment entitling it to pay off the old bonds at the holder's cost rather than at par. The situation would be no different if the holder of the maturing bonds had joined with the company in attempting to obtain Commission approval. Nor would it be different if both the company and the creditor had reviewed the adverse decision of the Commission under Section 24 of the Act, and it had been held on judicial review that the decision of the Commission represented the informed view of the Commission as to the re-

quirements of the statute, and that it could not be disturbed by the Court.

The situation would be entirely different if the Court, on judicial review, had held that the Commission had no power to issue a negative order under Section 7 unless it had power to adjudicate that the holder of the retiring bonds had, by reason of some circumstance in connection with their acquisition, only a legal claim against the company to recover cost. In that event, the question of the propriety of the negative order would turn upon the legal rights of the owner of the bonds to be retired. It would not turn upon the power of the Commission to interpret the statutory requirements.

The Commission's answer to the contention that its order of February 7, 1945 was a mere negative order based upon its interpretation of the statutory requirements is that its order of February 7, 1945 not only denied Federal's application for leave to amend the merger agreement, but also affirmatively approved the fairness and equity of paragraph Fourth(d) of the merger agreement, and it is said that this affirmative part of the Commission's order was affirmed by the Court of Appeals for the District of Columbia pursuant to the mandate of this Court. The short answer to this contention appears from the face of the order and the opinion of the Commission of February 7, 1945 (131a, 173a and 63a). The Commission there expressly stated that it was merely entering the affirmative part of its order to remove any doubt as to the legality of the securities which had been issued to others pursuant to the order that had been set aside. There was no suggestion in the opinion or in the order that the Commission was making an adjudication that Federal was entitled to satisfy the claims of Chenery, et al., by the payment of $313,190.22.

Moreover, it would have been entirely out of harmony with the strategy of the Commission to have presented to this Court for judicial review the question whether it had the power to adjudicate that Chenery, et al., had no claims against Federal other than to receive $313,190.22. In the first *Chenery Corporation* case, where the question presented to the Court was plainly this question, the Commission urged upon the Court not to consider this question, but, on the contrary, to decide the case on the theory that the alleged converse of the actual question presented was the one which should be reviewed. The brief of the Commission in this Court on the first review (*Securities and Exchange Commission* v. *Chenery Corporation, et al.,* 318 U. S. 80 (1943)) stated (pp. 22-23):

> "The issue before the Commission, acting as an administrative agency under these broad standards of the Act was, therefore, whether a plan, which permitted the securities acquired by respondents during the four years' pendency of the reorganization which they had initiated, was 'detrimental to the public interest or the interest of investors or consumers', and, by comparable standards, not 'fair and equitable'. * * *"

In a footnote to this sentence, the Commission stated:

> "Technically, the question before the Commission was the converse: After the plan had been amended to conform to the Commission's opinion of March 24, 1941, the issue was whether the declaration thus *eliminating* respondents' newly acquired holdings from participation (subject to a right to surrender them for cost plus 4 per cent interest) should become effective as not detrimental to the public interest and the interest of investors and whether the plan,

embodying such elimination, was fair and equitable. But the issue in the proceeding for review has been more realistically treated as stated in the text."

Again, the Commission stated in its brief (pp. 24-25):

"A majority of the court below posed the issue as turning upon the question 'whether there is any statute, regulation, or rule of common law or equity which proscribes' the respondents' security transactions during reorganization (R. 143). Since the majority found no such statute, regulation, or rule, it concluded that the Commission's findings and determination were unauthorized by the Act, that the Commission had made a policy determination open only to Congress, and that the order was therefore invalid (R. 139-150). We submit that the court below was in error in thus posing the issue. The issue was, rather, whether the Commission could properly conclude that it would be 'detrimental to the public interest or the interest of investors' and that it would be unfair and inequitable to permit the securities acquired by respondents while reorganization was pending to participate equally with others in the reorganization. We urge that the Commission's resolution of this question is in accord with current legislative and judicial concepts of management's obligations in analogous fields and is, under the same analogies fixing the elements of what is 'fair and equitable,' wholly consistent with the statutory standards which the Commission was required to apply. If this be so, as we submit it is, the Commission was free to adopt the principle, and since its determination was reasonable, it should not have been overturned by the court below. *United States* v. *Lowden,* 308 U. S. 225, 231, and cases cited; *Gray* v. *Powell,* 314 U. S. 402."

It is submitted that when this Court in the second *Chenery Corporation* case (*Securities and Exchange Commission* v. *Chenery Corporation, et al.,* 332 U. S. 194 (1947)) said (p. 196):

> "On remand, the Commission reexamined the problem, recast its rationale and reached the same result * * *"

the Court had in mind as "the same result" that which was urged by the Commission in its brief as above quoted, namely, that it would be detrimental to the public interest or the interest of investors, and that it would be unfair and inequitable to permit the securities owned by Chenery, et al., to participate equally with others in the reorganization.

From the standpoint of logic, the converse of any given proposition may or may not be true, depending upon whether or not there are any undistributed terms. The statement that all Englishmen are British subjects is true, but the statement that all British subjects are Englishmen is false. WOLF, *Logic* in 14 ENCYC. BRIT. 307, 310 (1947).

In the present case, one can accept fully the doctrine that it is for the Commission and not the Court to determine whether it is detrimental to the public interest or the interest of investors and consumers and not fair and equitable for Federal to issue securities, in pursuance of a plan of reorganization, to Chenery, et al., on the same terms as such securities were issued to others. But it does not follow from this that it is for the Commission and not the Court to determine whether it is fair and equitable and not detrimental to the public interest or the interest of investors and consumers for Federal to deprive Chenery, et al., of their stock upon payment of $313,190.22. The first proposition is looked at from the standpoint of

the power of the Commission over the issuance of securities by a corporation. The second proposition is looked at from the standpoint of the constitutional and legal rights of security holders in a fair and equitable reorganization.

If the question is asked as to why the Commission should prevent Chenery, et al., from making a profit out of the merger but should not prevent Chenery, et al., from making a profit out of appraisal proceedings, or out of insistence upon their rights, as set forth in their certificates, in the liquidation of Federal, the answer may be that while the Commission had the power to prevent Chenery, et al., from making a profit as the result of an amendment to the merger agreement because it had the power to prevent Federal from accomplishing such an amendment, it may not have the power to forfeit the stock of Chenery, et al., by a proceeding under Section 11(e). In any event, the question whether the Commission's order of February 7, 1945 was effective to accomplish the forfeiture of the stock has not been adjudicated.

It is our view that the District Court was in error in believing that its action in the liquidation proceeding was controlled by this Court's decision in the second *Chenery Corporation* case.

Respectfully submitted,

ALLEN S. HUBBARD
Counsel for Respondent
Federal Water and Gas
Corporation

HUGHES, HUBBARD & EWING
One Wall Street
New York, N. Y.,
Of Counsel.

Dated, June 21, 1950.